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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROMELIO CORELIO ESPINOZA, Defendant and Appellant.	B286713 (Los Angeles County Super. Ct. No. KA112725)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, vacated in part, and remanded for resentencing.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivri and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Romelio Espinoza of three counts of oral copulation or sexual penetration involving a child 10 years of age or younger (Pen. Code, § 287, subd. (b); counts 2, 3, & 6)[1] and five counts of lewd or lascivious acts involving a child under the age of 14 (§ 288, subd. (a); counts 1, 4, 5, 7, & 8). The jury also found true allegations that Espinoza's crimes were committed against more than one victim (§ 667.61, subds. (b), (c), & (e); counts 1, 4, 5, 7, & 8). The trial court sentenced him to the low term of three years on count four plus 105 years to life in state prison on the remaining counts. On appeal, he claims evidentiary and sentencing error. We affirm the conviction, vacate the sentence, and remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

The issues raised in this appeal do not require a detailed recitation of the facts.

Briefly, Espinoza's crimes involved four of his wife's grandchildren: Dina, Amanda, Evelyn, and Edwin Doe. Dina and Amanda are sisters, and Evelyn and Edwin are also siblings.

Espinoza molested Dina in 1997 and 1998, when she was seven (counts 5 and 8), and he molested Amanda in 2007, when she was eight (counts 6 and 7). In 2016, he committed his crimes against Evelyn, then eight (counts 1, 2, and 3) and Edwin, then six years old (count four).

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[1] All undesignated section references are to the Penal Code.

DISCUSSION

1. *Evidentiary Error*

Before trial (in November 2017), the prosecutor moved to exclude testimony that in 2012 Dina transferred money from a joint account with her grandmother (Espinoza's wife, Amanda A.) to an account in Dina's name alone.[2] (Evid. Code, §§ 210, 352, 402.) Defense counsel acknowledged that Dina had the legal right to use the money, but represented that the reason Amanda A. had left Dina on the account was so that money from the account could be used for Amanda A.'s funeral expenses and other debts. He argued that the transfer showed that Dina "stole" the money with malice and was "proof of [Dina's] character flaw . . . for [dis]honesty."

The trial court commented that joint owners have joint access to account funds, and whether the funds were used for an agreed purpose or not was irrelevant to the issues before the jury. The court excluded the evidence as a "he-said-she-said collateral issue" likely to confuse the jury under Evidence Code section 352.

After jury selection, defense counsel asked the trial court to revisit the issue, arguing that it was common sense that any evidence of taking money from her grandmother affected Dina's credibility because this specific conduct proved her character trait of dishonesty. Citing Evidence Code section 787 (generally prohibiting the use of specific instances of conduct to attack or support a witness's credibility), the trial court again rejected defense counsel's argument.

On appeal, Espinoza concedes the evidence was inadmissible to prove Dina's dishonesty under Evidence Code

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[2] Defense counsel represented that Amanda A. had discovered the transaction in 2015.

section 787 but contends that it was admissible to prove her malice toward her grandmother (Amanda A.), which would support the conclusion that Dina had a bias and was motivated to falsely accuse Espinoza. (See Evid. Code, § 780, subd. (f) [except as otherwise provided by statute, in determining witness credibility, jury may consider any matter tending to prove or disprove truthfulness of testimony, including existence or nonexistence of bias, interest, or other motive].)

We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 929–930.)

First, Espinoza concedes that the excluded evidence was inadmissible on the ground he asserted in the trial court—that Dina's purported theft was proof of her dishonest character. Because he failed to specifically raise the issue of bias—the ground he now asserts for the first time on appeal—he has forfeited this claim of error. (See *People v. Fauber* (1992) 2 Cal.4th 792, 854, citing Evid. Code, § 354 [where trial counsel did not specifically raise particular ground of admissibility, the defendant is precluded from arguing particular theory on appeal].)

Moreover, defense counsel gave no indication that Amanda A. would testify that she ever raised the issue with Dina, that Amanda A. viewed the transfer as a theft when she discovered it, or that Dina was aware of any dissatisfaction on her grandmother's part.[3] There was no suggestion that the discovery led to a confrontation or a demand for repayment or changed the

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[3] There is no indication of the amount transferred, and it is unclear whether Dina remained a joint owner on the account after the transfer.

relationship between Dina and Amanda A. in any way. (See *People v. Scheid* (1997) 16 Cal.4th 1, 13–14 [the trial court has broad discretion to determine "whether the evidence tends "'logically, naturally, and by reasonable inference" to establish material facts such as . . . motive"'].)

Therefore, even if his argument to the trial court may be construed as having raised the issue of Dina's alleged bias under subdivision (f) of Evidence Code section 780, Espinoza fails to explain how evidence that Dina transferred an unspecified amount of money from a joint account with Amanda A. in 2012 supports an inference that Dina was motivated to fabricate false claims of sexual abuse against Espinoza in 2016. (See Evid. Code, § 210 [relevant evidence is evidence having any tendency in reason to prove or disprove "any disputed fact that is of consequence to the determination of the action"].) In short, the proffered evidence was not relevant.

Finally, even if error occurred, it was harmless. Where a "'trial court's ruling does not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense,' the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to defendant" as stated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) Defense counsel had the opportunity to cross-examine Dina, emphasizing her continued contact with her grandmother and Espinoza and her delay in reporting Espinoza's conduct to challenge Dina's credibility. The jury believed Espinoza had sexually abused all

four victims. We find it highly unlikely that the jury would have disbelieved Dina simply because her credibility had been challenged on such a tenuous basis.

On this record, we find no abuse of discretion. Even if error occurred, on this record we hold that it is not reasonably probable that a result more favorable to Espinoza would have resulted from presentation of the excluded testimony.

2. *Sentencing Error*

The "One Strike" law (§ 667.61) is an "alternative and harsher sentencing scheme" that applies to specified felony sex offenses. (*People v. Anderson* (2009) 47 Cal.4th 92, 102, 107 (*Anderson*).) Generally speaking, it mandates an indeterminate sentence of 15 or 25 years to life in prison when the jury has convicted the defendant of a specified sex crime (§ 667.61, subd. (c)) and has also found true certain factual allegations (§ 667.61, subds. (d), (e)). (*Anderson*, *supra*, at p. 102.) A "One Strike" allegation exposes a defendant to greater punishment than would be authorized by a verdict on the offense alone–without a true finding on the section 667.61, subdivision (d) or (e) allegation(s), a defendant can only be sentenced to a lower determinate term. (*Id.* at p. 108.)

In counts 1, 4, 5, 7, and 8, Espinoza was convicted of committing lewd acts against a child under the age of 14 (§ 288, subd. (a)). As to each of these five counts, the jury returned true findings that the crimes alleged were committed against more than one victim within the meaning of section 667.61, subdivisions (b) and (e).

The trial court sentenced Espinoza to the low term of three years (§ 288, subd. (a)) on count four plus four consecutive 15-years-to-life terms on counts 1, 5, 7, and 8 (§ 667.61, subds. (b),

(e)).[4] The trial court explained that "these charges are all covered by Penal Code section 667.6[, subdivision] (d)[5], [California] Rule[s] of Court[, rule] 4.426(a)(2), certainly as to counts 1, 4, 5, 7 and 8, which call for consecutive mandatory sentences with different victims, full and separate sentences." Defense counsel did not object.

Espinoza contends and the People agree that the trial court's stated belief that it had no discretion to impose concurrent rather than consecutive terms on counts 1, 4, 5, 7, and 8 was mistaken and requires remand for resentencing. Subdivision (i) of section 667.61 provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Espinoza's qualifying offenses—violations of section 288, subdivision (a)—are specified in paragraph (8) of section 667.61, subdivision (c).

Therefore, by its terms, subdivision (i) of section 667.61 does not *mandate* the imposition of consecutive sentencing for violations of section 288, subdivision (a), leaving the decision to impose consecutive or concurrent terms to the discretion of the trial court under section 669. (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.) Accordingly, we remand the matter for

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[4] The trial court also sentenced Espinoza to consecutive 15-years-to-life terms on counts 2, 3, and 6 under section 287, subdivision (b). These counts are not at issue in this appeal.

[5] As we will discuss, section 667.61, subdivision (i) refers to section 667.6, subdivision (d).

resentencing. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263.)

While conceding error in this respect, the People argue that on remand the trial court must sentence Espinoza to a term of 25 years to life, pursuant to subdivision (j)(2) of section 667.61, for each violation of section 288, subdivision (a). The People assert that application of this provision is mandatory[6], and therefore sentencing pursuant to subdivision (b) of section 667.61 was unauthorized.

Subdivision (b) of section 667.61 states: "*Except as provided in subdivision* (a), (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one of

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[6] The People rely on *People v. Hammer* (2003) 30 Cal.4th 756, 769, footnote 11 for this assertion. The *Hammer* court contrasted the Three Strikes law and the Habitual Sexual Offender law with the One Strike law, noting that trial courts retain discretion to "strike" any punishment-enhancing circumstance, including a prior strike conviction in the interests of justice under the first two statutory schemes, but under the One Strike law, "courts have no such discretion; sentencing under the full and severe terms of the law is mandatory. ([Former] § 667.61, subd. (f))." (*Ibid.*) Subdivision (g) of section 667.61 (formerly subdivision (f)) specifically states: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section."

In addition, subdivision (h) of section 667.61 specifies that "Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section."

the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life."[7] (Italics added.) At the same time, subdivision (j)(2) provides that a person convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) "upon a victim who is a child under the age of 14 years of age," shall be sentenced to a term of 25 years to life in state prison.[8] By definition, section 288, subdivision (a) requires that the victim be under 14 for its commission.

In his reply brief, Espinoza responds that the version of section 667.61 including subdivision (j)(2) was not in effect until September 9, 2010 (Stats. 2010, ch. 29, § 16). Because the crimes involving Dina and Amanda occurred before that time, sentencing him under that provision as to counts 5, 7, and 8 would violate constitutional ex post facto principles.[9]

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[7] It is undisputed that Espinoza's section 288, subdivision (a) convictions (counts 1, 4, 5, 7, 8) are specified in subdivision (c)(8) of section 667.61, and the jury found true one of the circumstances specified in subdivision (e)—committing his offenses against multiple victims under subdivision (e)(4).

[8] "Any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life." (§ 667.61, subd. (j)(2).)

[9] See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173 [under the ex post facto clauses of the federal and state constitutions, the legislature may not retroactively increase the punishment for criminal acts], 1774 [applying version of § 667.61 in effect at time of crimes].

As to all five counts, Espinoza further argues that prosecutors ordinarily have the discretion to determine which charges to bring as stated in *People v. Cheaves* (2003) 113 Cal.App.4th 445, 452, and nothing in section 667.61 requires the prosecutor to pursue the harsher penalty set forth in subdivision (j)(2). In Espinoza's view, the manner in which the counts were pled and proved reflects the prosecutor's exercise of the discretion not to do so. He notes that the prosecutor made no reference to this subdivision in the information, and referred only to subdivisions (b), (c), and (e).[10] The prosecution's sentencing memorandum referred only to the imposition of a 15-years-to-life term, and the prosecutor raised no objection when the trial court imposed this term on all counts.

Because this matter must be remanded for resentencing on the consecutive sentencing issue, and because the issue of sentencing pursuant to section 667.61, subdivision (j)(2) was raised for the first time in the respondent's brief, without any discussion of the case law relating to section 667.61, we conclude that the better course is for the parties to address on remand the competing considerations this issue raises. (See e.g., *People v. Mancebo* (2002) 27 Cal.4th 735, 752 [discussing due process concerns in sentencing under § 667.61].)

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[10] In addition, the information included the further notation of "15 to Life State Prison" as the "Alleg. Effect" for each count.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the trial court to exercise its discretion to impose consecutive or concurrent terms under Penal Code section 667.61 on counts 1, 4, 5, 7, and 8, and to determine the applicability of the One Strike issues raised for the first time on appeal.

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MICON, J.*

We concur:

MANELLA, P. J. WILLHITE, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.